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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 32

MACY'S WEST STORES, INC., Employer, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 287, Union.	No. 32-RC-246415 **REQUEST FOR REVIEW**

I. GROUNDS FOR REQUEST

Pursuant to Section 102.69(c)(2) of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board"), Petitioner International Brotherhood of Teamsters, Local 287 ("Union"), submits this Request for Review of the Regional Director's January 10, 2020 "Decision on Exceptions to Hearing Officer's Report and Certification of Results of Election" ("Decision"). The Decision certified that the Union did not obtain a majority of votes and therefore is not the exclusive representative of a unit of workers in various classifications at five department stores operated by Employer Macy's West, Inc. ("Employer").

Compelling reasons exist for the Board to grant review of the Regional Director's Decision. First, the Region's finding on a substantial factual issue — specifically, whether or not two Jewelry Clerical ("JC") Support employees share a community of interest with other members of the petitioned-for unit — is clearly erroneous on the record. Second, the Region departed from Board precedent in its interpretation of the newly adopted *Boeing*[1] unit composition test, thereby raising substantial questions of law and/or policy. Third, raising further substantial questions of law and/or policy, the Regional Director misinterpreted language in the parties' stipulated election agreement that explicitly made eligible to vote any employee who performed a certain amount of bargaining unit work, no matter their ostensible job classification. And fourth, there is an absence of Board precedent to support the Region's contention that the *Butler Asphalt*[2] misclassification test applies in a case such as this, where the parties' stipulated election agreement is ambiguous on its face.

II. PROCEDURAL HISTORY

On August 12, 2019, the Union filed a petition to represent a bargaining unit made up of employees at five of the Employer's facilities located in the cities of Santa Clara, California, and San Jose, California. (*See* Hearing Officer's Report on Challenged Ballots and Objections ["Report"] at p. 2.) The Board conducted an election to resolve this petition on September 4

[1] *The Boeing Company*, 368 NLRB No. 67 (2019) ("*Boeing*").

[2] *Butler Asphalt, LLC*, 352 NLRB 189 (2008).

and 5, 2019. (*See* Decision at p. 1.) According to the parties' Stipulated Election Agreement ("Election Agreement"), the following employees were eligible to vote in this election:

> All full-time and regular part-time PB Merchandising Associates, Merchandising Associates, Pricing Associates, Receiving Associates, Signing Associates, Visual Merchandisers, Shoe Expediters, Merchandising Flex Associates, Cosmetics Macy's Paid Stock Associates, Pricing Flex Associates, Receiving Flex Associates, Signing Flex Associates, Pricing Team Leads, Receiving Team Leads, Shoe Expediter Leads, Signing Team Leads, and Support Team Leads employed by the Employer at its facilities located at 2801 Stevens Creek Boulevard, Santa Clara, CA, 3051 Stevens Creek Boulevard, Santa Clara, CA, 925 Blossom Hill Road, San Jose, CA, 2210 Tully Road, San Jose, CA, and 300. Stanford Shopping Center, Palo Alto, CA; excluding all other employees, employees represented by a labor organization, VP Merchandising Associates, Cosmetics VP Stock Associates, confidential employees, office clerical employees, guards, and supervisors as defined in the Act.
>
> Also eligible to vote are all employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election.

(Decision at p. 1-2; Report at p. 2.)

The Election Agreement also allowed for VP Stock Associates and JC Support employees to vote subject to challenge, with their eligibility to be determined by the Region based on community of interest factors. (*See* Decision at p. 2.)

Upon counting of the ballots, the Tally showed that of the approximately 234 eligible voters, 86 votes were cast for the Union and 90 votes were cast against, with 20 challenged ballots, a number that was sufficient to affect the results of the election. (*See* Report at p. 2.) The Union thereafter filed several Objections to the conduct of the election. On October 7 and 8, 2019, a hearing was held at Region 20 of the Board to decide the challenged ballots and the Union's Objections. (*See* Report at p. 3.) The parties thereafter submitted post-hearing briefs. Notably, the Union and the Employer agreed to informally resolve several of the eligibility disputes. The Employer agreed that two challenged ballots should be counted, and the Union

agreed that 12 additional voters should be excluded. (*See* Report at p. 2-3.) This left a total of six outstanding challenged ballots for the Region to rule upon, with three ballots being sufficient to sway the result of the election.

On November 19, 2019, the Hearing Officer issued her Report, which recommended that the Region overrule the Union's Objections to the Conduct of the election. (*See* Report at p. 16-17.) The Union did not except to that finding. The Hearing Officer also recommended sustaining the challenges to the ballots cast by the two JC Support employees, Robin Cobarrubias and Vi Thi Tram Le, and the ballots cast by three employees who the Union alleged had been misclassified — VP Merchandising Associates Madelynn Martinez and Emma Naranjo, and Shoe Sales Associate Sonja Roberts. (*See* Report at p. 17.) The Hearing Officer did not rule on the eligibility of VP Stock Associate Raquel Fernandez, who voted subject to challenge, because her lone vote would not have been sufficient to sway the election. (*See* Report at p. 14.) On December 17, 2019, the Union filed exceptions to the Hearing Officer's recommendations on the challenged ballots, along with a supporting brief. Finally, as previously stated, the Regional Director issued a Decision on January 10, 2020, adopting the Hearing Officer's findings and certifying the results of the election. (*See* Decision at p. 6.)

III. LEGAL ARGUMENT

There are six voters whose eligibility remains in controversy. With respect to the three employees who voted subject to challenge, VP Stock Associate Raquel Fernandez, JC Support Robin Cobarrubias, and JC Support Vi Thi Tram Le, the Union requests review of the Region's finding that they should be excluded from the petitioned-for unit under the *Boeing* unit composition test. As for the other three employees, VP Merchandising Associate Madelynn Martinez, VP Merchandising Associate Emma Naranjo, and Shoe Sales Associate Sonja Roberts, the Union requests review on two grounds: (1) the Region wrongfully ignored a clear provision in the Election Agreement that carved out a class of eligible voters based on the amount of bargaining unit work performed, regardless of ostensible job classification; and (2) the *Butler Asphalt* decision, which holds that the Board will only look behind an employee's job

classification to their "bona fide" job duties where there is evidence of a last-minute gerrymander by the Employer, does not apply here, because the Election Agreement is ambiguous.

A. THE BOARD SHOULD GRANT REVIEW BECAUSE THE REGION MISAPPLIED THE BOEING TEST AND DECIDED, AGAINST THE WEIGHT OF EVIDENCE, THAT THE TWO JC SUPPORT EMPLOYEES SHOULD BE EXCLUDED FROM THE PETITIONED-FOR UNIT

In a recent line of cases culminating in *Boeing*, the Board clarified that a bargaining unit is only appropriate where any excluded employees "have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members." *See* 368 NLRB No. 67 (2019), *supra*, slip op. at 4. This overruled the former test set out in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) ("*Specialty Healthcare*"), under which a bargaining unit was presumed appropriate unless there was an "overwhelming" community of interest between the petitioned-for unit and the excluded employees. Some criticized the *Specialty Healthcare* test as facilitating the "undue proliferation" of units, which is historically disfavored. *See, e.g.*, *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at 21, n.14 (2017); s*ee also NLRB v. R.C. Can Co.*, 328 F.2d 974, 978-79 (5th Cir. 1964) ("One of the underlying policies of the NLRA [is] the promotion of labor peace and stability … Peace and stability are weakened by the balkanization of bargaining units in a single, coordinated workplace."). While the *Specialty Healthcare* test was essentially a one-step process — "The Board examines the petitioned-for unit first … If that unit is an appropriate unit, the Board proceeds no further"[3] — the *Boeing* test is comprised of three steps:

> First, the proposed unit must share an internal community of interest. Second, the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed. Third, consideration must be given to the Board's decisions on appropriate units in the particular industry involved.

See Boeing, slip op. at 3.

[3] See 357 NLRB at 941.

Here, the Region's determination (based on *Boeing*) that the two JC Support employees do not belong in the petitioned-for unit is in error for three reasons. First, the Hearing Officer's conclusion that a majority of the traditional community of interest factors support excluding these two employees from the unit, which the Region adopts, is clearly erroneous in light of the factual record. Second, the Region departs from Board precedent in finding that an obvious flaw in the Hearing Officer's community of interest analysis was merely "harmless error." And third, the Region again departs from Board precedent it its findings at Step 2 of the *Boeing* test, which contradict its findings at Step 1. Based on these defects, the Union requests review.

1. <u>The Region's Factual Determinations on Several Community of Interest Factors Are Clearly Erroneous</u>

In her Report, the Hearing Officer identified the eight traditional factors used to find an "internal" community of interest within a petitioned-for bargaining unit.

> Whether employees (1) are organized into a separate department; (2) have distinct skills and training; (3) have distinct job functions and perform distinct Work; (4) are functionally integrated with other employees; (5) have frequent contact with other employees; (6) interchange with other employees; (7) have distinct terms and conditions of employment; and (8) are separately supervised.

(Report at p. 9 [citations omitted].)

The Hearing Officer ultimately concluded that, with respect to the JC Support employees, "most of the factors weigh against finding an internal community of interest." Specifically, she found that while Factor No. 3 ("have distinct job functions and perform distinct work") and Factor No. 7 ("have distinct terms and conditions of employment") weigh in favor of including these two employees in the unit, the remaining six factors support exclusion. The Regional Director concurred, and adopted this finding. (*See* Decision at p. 3 ["The Hearing Officer correctly found that only two [factors] weigh in favor of finding that an internal community of interest … terms and conditions of employment, and distinct job functions."].)

The Union does not contest that some of these factors, specifically No. 1 (separate department), No. 6 (employee interchange), and No. 8 (separate supervision), do in fact favor excluding the JC Support employees. However, the Region's findings on Factor No. 2 (distinct

skills and training), No. 4 (functional integration), and No. 5 (frequent contact with other employees), are clearly in error. Had the Region correctly identified that these three factors support finding an internal community of interest with the rest of the petitioned-for unit, there would be five factors supporting such a finding, and only three against. Thus, the proposed unit, with the JC Support employees included, would have passed Step 1 of the *Boeing* test.

a. Factor No. 2 – "Special Skills and Training"

With respect to Factor No. 2, the Hearing Officer found that the JC Support employees "possess distinct skills and training from employees in the stipulated unit such as receiving jewelry-specific training, undergoing more rigorous background checks, and operating special tools such as ring sizers, Kevlar covers, and diamond testers." (Report at p. 9.) This finding, while technically accurate, lacks necessary context. The Union concedes that jewelry department employees receive specialized training. That said, *all* Macy's employees, including those in the petitioned-for bargaining unit, receive some basic level of specialized merchandise training in their area. The expertise that Ms. Cobarrubias and Ms. Le possess relates to the Employer's jewelry stock. While different in type, this expertise is no different in degree than the expertise possessed by Cosmetics Paid Stock Associates or Shoe Expediters in cosmetics stock or footwear stock. Indeed, Heather Stallion, the Store Manager at one of the Employer's facilities, testified that "merchandising and stock" associates, a category that would include various classifications included in the petitioned-for unit, possess such area-specific expertise. (*See* Hearing Transcript ["Tr."] at 281:3-5 [**Q** "And they're expected to gain expertise in the merchandising and the stocking of items in that area, correct?" **A** "Correct."].)

This missing context aside, the Hearing Officer greatly exaggerated the "special skills and training" that jewelry department employees apparently possess. In fact, Ms. Cobarrubias explicitly downplayed any "special skills" she might need to perform her job in her hearing testimony. (*See* Hearing Transcript ["Tr."] at 115:17.) She stated that her use of the "diamond testing" tool, which the Hearing Officer relied on as evidence of distinct skills and training, does not require any skills or training at all. (Tr. 115:17-18 ["You just get the diamond tester and hit

the top of the diamond with it. Anybody can do that. It's easy."].) Moreover, the other "special tools" cited by the Hearing Officer — i.e., the use of "ring sizers" and "Kevlar covers" — came not from Ms. Cobarrubias or Ms. Le's testimony, but from Ms. Stallion. This is problematic for several reasons. First, the JC Support employees, not the Store Manager, are the experts on their day-to-day duties. This is especially true given the Hearing Officer's finding — which the Union does not dispute — that Jewelry Department employees are supervised not by the Store Manager, but by a separate district manager. (*See* Tr. 119:10-11; Report at p. 10; Decision at p. 3.) It makes little sense that the region would rely on Ms. Stallion's testimony as determinative evidence of "special skills and training," without any corroboration from the JC Support employees themselves, while at the same time finding that Ms. Stallion does not even supervise the JC Support employees. Second, even ignoring this, there is no support in the record indicating that "ring sizing" is a special skill, or that the JC Support employees even perform this function. And third, while Ms. Stallion did testify that jewelry department employees use "Kevlar covers" to protect their merchandise, she failed to sufficiently explain how installing and removing these covers is a remotely "special" skill. (*See* Tr. 207:1; 208:4-6; 327:8-16, 22-24; 365:1-3 [Various references to the Kevlar covers without explanation of how they are used].)

The Hearing Officer's finding that the JC Support Employees possess special skills and training that differentiate them from any other employee in the petitioned-for unit is flawed. Her Report relies totally on the testimony of Ms. Stallion, the Store Manager, who does not even supervise the JC Support employees. Moreover, the "special" skills cited in her Report are either not explained in the record, or in reality very simple tasks. Despite these flaws, the Region adopted the Report's conclusions. (*See* Decision at p. 4 [finding with no additional explanation that the JC Support employees "have distinct skills and training"].) Because this finding demonstrates clear error on the part of the Region, the Union requests review.

b. Factor No. 4 – "Functional Integration"

The Hearing Officer concluded in her Report that the functional integration factor weighed against including the JC Support Employees in the bargaining unit. She found that "unlike Receiving Associates, Merchandising Associates, Visual Merchandisers, and Signing Associates, who all work together to perform support work, JC Support employees perform all of these functions themselves." (Report at p. 9.) According to the Hearing Officer, "with the sole exception of tote deliveries, employees in the stipulated unit play no role in the support or sale of jewelry." (*Ibid*.) In sum, the Hearing Officer found that "JC Support functions almost completely independently from employees in the otherwise stipulated unit." (*Ibid*.) The Regional Director again concurred. (*See* Decision at p. 4 ["The JC Support employees … have … no functional integration with the Unit employees].)

Ms. Stallion's testimony casts doubt on the Region's conclusion that there is a lack of functional integration between employees in the jewelry department and employees in the rest of the store. In fact, she explained that salespeople from other areas of the store, such as designer dresses, will regularly accompany a customer to the jewelry department where they can then purchase pieces of jewelry to complete their new outfit:

> **Q** Okay, and is there effort made to coordinate jewelry sales with sales of other clothing?
> **A** You mean like through my style list, or -- yeah.
> **Q** Yeah. A salesperson would say to some woman who is buying a designer dress, I know some jewelry that would look – go well with this, and take them down to have them -- a sales associate there?
> **A** Yes, yep.

(Tr. 273:4-11.)

This testimony demonstrates that while there is some degree of isolation between employees in the jewelry department and other store employees, the two groups of employees regularly work together to accomplish the Employer's goals, i.e., satisfying customers' merchandise needs.

Relatedly, the Hearing Officer's conclusion that JC Support employees accomplish their tasks wholly independently, with no support from bargaining unit employees, is also inconsistent

with the record. Ms. Cobarrubias was clear in her testimony that for certain items of jewelry, specifically "fine watches" and "bridge jewelry," she must either physically travel to her store's receiving dock to transport the merchandise back to the jewelry department, or, more often, wait for one of the store's Receiving Associates (a bargaining unit position) to deliver the items in a tote carrier. (Tr. 106:7-16.) This is another clear example of interchange between employees in the petitioned-for unit and the JC Support team that was ignored by the Hearing Officer and the Regional Director. Thus, the Region's findings were in error, and the Union requests review.

c. Factor No. 5 – "Frequent Contact with Other Employees"

According to the Hearing Officer, "JC Support employees … have minimal contact with employees in the stipulated unit." (Report at p. 9.) Though the Hearing Officer conceded that these employees "occasionally interact with employees in the otherwise stipulated unit," she ultimately found that "the vast majority of their time is spent in the Jewelry Department or in their offices, away from unit employees." (*Ibid*.) The Regional Director came to the same conclusion, again with no additional analysis. (*See* Decision at p. 4.)

Similar to the previous two factors discussed above, the Region's findings are flawed, and are easily contradicted by the direct testimony of Ms. Cobarrubias. JC Support employees walk the floor to do signings and markdowns, among other tasks. Ms. Cobarrubias testified that she has regular contact with bargaining unit members in the receiving dock when she delivers empty boxes and garbage. (Tr. 108:3-8.) In fact, she testified that she is "always on the dock," where Receiving Associates are located. (Tr. 108:8.) Ms. Cobarrubias also testified that she makes signs for the jewelry area not in the jewelry department, but in the same area where associates from other departments make their signs. (Tr. 121.) This does not at all sound like an employee who, in the Hearing Officer's words, spends "the vast majority" of their time isolated in the jewelry area. Similarly, the Hearing Officer again ignores Stallion's testimony about salespeople from other areas of the store accompanying customers to the jewelry area to complete their new outfit. (Tr. 273:7.) Once again, the Region's findings demonstrate clear error, and the Union requests review.

2. The Hearing Officer's Emphasis on Certain Community of Interest Factors Over Others Was Not Harmless Error

After listing the eight relevant community of interest factors at Step 1 of the *Boeing* test, the Regional Director correctly pointed out that "the Board considers all of the factors together and no single factor is controlling." (Report, p. 9, ¶ 1 [citations omitted].) In the same paragraph, however, she cites *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1271 (2005), for the proposition that of these seven factors, two — employee interchange and common supervision — are the "most important." (Report at p. 9, ¶ 1.) This is incorrect. The Board has identified these two factors as more important than others in accretion cases, which are analyzed under the "overwhelming" community of interest standard, not the traditional community of interest standard. Neither *Boeing* nor any other available representation cases reference employee interchange and common supervision as more or less important than any other factor. Contrast this with various accretion cases. *See, e.g.*, *Super Valu Stores*, 283 NLRB 134, 136 (1987); *Towne Ford Sales*, 270 NLRB 311, 312 (1984); *E.I. Dupont De Nemours, Inc.*, 341 NLRB 607, 608 (2004). Indeed, the Board in *Frontier Telephone* was explicit regarding the application of its holding: "the 'two most important factors' … the two factors that have been identified as 'critical' *to an accretion finding* -- are employee interchange and common day-to-day supervision." *See* 344 NLRB at 1271 (emphasis added).

The Regional Director conceded that the Hearing Officer's reliance on *Frontier Telephone* was in error, but classified the error as harmless. "A careful review of the Hearing Officer's community-of-interest analysis shows that she did not exalt the interchange and common-supervision factors over the other six factors such that she reached the wrong result." (Decision at p. 3.) Yet this is contradicted by even a surface-level reading of the Hearing Officer's Report. With respect to the JC Support employees, the Hearing Officer concluded that "most of the factors weigh against finding an internal community of interest, including the two *most important factors* of common supervision and employee interchange." (Report at p. 10 [emphasis added].) The only logical takeaway here is that the Hearing Officer valued these two factors as "most important." And while the Region would likely assert that it merely counted the

factors supporting each side (two for inclusion, six against), this does not follow from the Hearing Officer's Report. Indeed, the Hearing Officer specifically mentions that the six factors weighing against inclusion here were the same two factors the Board relied upon to exclude a group of employees in a previous case, *The Neiman Marcus Group, Inc.*, 361 NLRB 50 (2014). But the Hearing Officer is conflating steps of the *Boeing* test, skipping to Step 3, and implicitly admitting that she valued certain factors over others at Step 1. This is yet another indication that the Region's Step 1 *Boeing* analysis is flawed at its core, and must be reviewed.

The Hearing Officer's misplaced reliance on *Frontier Telephone* and *The Neiman Marcus Group* is problematic for several reasons. First and foremost, the Report concluded that the "common supervision" and "employee interchange" factors weighed against finding an internal community of interest between the JC Support employees and the rest of the Union's proposed bargaining unit. (*See* Report at p. 10, ¶¶ 1-2.) Given the weight that the Hearing Officer apparently afforded these two factors, it is logical to assume they were crucial to the ultimate finding that no community of interest existed. Whether the JC Support employees share a community of interest with the rest of the unit should therefore be reevaluated, with each factor awarded equal weight. Otherwise, the entirety of the Report's *Boeing* analysis would remain tainted. Also troubling is the extent to which the Hearing Officer applied accretion principles in a representation case. An "overwhelming" community of interest standard is much more difficult to meet than a traditional community of interest standard, and replacing one with the other is a meaningful error. If the Hearing Officer — even inadvertently — applied an accretion standard at Step 1 of the *Boeing* test, the JC Support employees were not given a fair chance to qualify as members of the bargaining unit.

3. The Region's Step 1 *Boeing* Analysis and Step 2 *Boeing* Analysis Are Inherently Contradictory, and Therefore Depart from Board Precedent

As indicated above, the Report concluded at Step 1 of the *Boeing* test that the JC Support employees did not share an internal community of interest with the rest of the Union's petitioned-for bargaining unit. The Hearing Officer found that while the JC Support employees

shared job functions and various terms and conditions of employment with members of the unit — such as policies, procedures, rules, benefits, and wage structure — the other six community of interest factors distinguished the two groups. (Report at p. 9, ¶¶ 2-5; p. 10 ¶¶ 1-2.) The Regional Director then adopted these conclusions into the Decision.

At Step 2 of the *Boeing* test, which involves comparatively analyzing and weighing "the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit," the Hearing Officer determined that JC Support employees shared a community of interest with employees who were *excluded* from the Union's proposed unit, such as VP Merchandisers and Cosmetic VP Stock Associates. (Report at p. 10, ¶ 5.) Thus, according to the Hearing Officer, even if the JC Support employees shared a community of interest with the rest of the petitioned-for bargaining unit, they should still be excluded from the unit due to their shared interests with other excluded employees. In the specific context of this case, however, these two findings are inherently contradictory. Because the Regional Director failed to sufficiently resolve this contradiction in the Decision, the Union requests review.

According to the Report, JC Support employees, VP Merchandisers, and Cosmetic VP Stock Associates "receive the same health benefits and are governed by the same policies and procedures." (Report at p. 10, ¶ 5.) The Hearing Officer concedes, however, that employees in the Union's proposed unit also receive these same benefits, and are also governed by these same policies and procedures. (Report at p. 9, ¶¶ 2 ["JC Support employees … are subject to the same policies, procedures, and rules as all other employees, [and] share nearly identical terms and conditions of employment with employees in the otherwise stipulated unit."].) Moreover, the Hearing Officer recognizes, at least to some extent, the contradictory nature of her *Boeing* analysis. "If these criteria are sufficient to find that JC [S]upport employees share a community of interest with employees in the otherwise stipulated unit they would also be sufficient to find … a community of interest with these excluded employees." (Report at p. 11, ¶ 1.)

This leads to an obvious question. Why, when presented with three groups of employees — Group 1, those included in the Union's petitioned-for unit; Group 2, the JC Support

employees; and Group 3, the VP Merchandisers, and Cosmetic VP Stock Associates — who share the same terms and conditions of employment and job functions, but can be distinguished by the same community of interest factors (functional integration, interchange, supervision, etc.), did the Hearing Officer decide that Group 1 and Group 2 *do not* share a community of interest, but Group 2 and Group 3 *do*? The obvious answer would be that Step 1 and Step 2 of the *Boeing* analysis are actually different tests, meant to evaluate different factors. But this is not the case; the Hearing Officer explicitly notes that each of the first two *Boeing* steps require weighing the exact same factors. (Report at p. 8, ¶ 4 ["To analyze whether employees have shared interests *at both the first and second steps*, the Board considers …"] (emphasis added).) Additionally, the *Boeing* Board itself said as much, repeatedly noting that both Step 1 and Step 2 involve a traditional community of interest analysis. *See Boeing*, slip op. at 3-4. Thus, there is no obvious explanation for the Hearing Officer's decision.

As noted above, the Regional Director makes little effort to resolve this contradiction. In fact, the Region actively disregards the Hearing Officer's Step 2 analysis:

> [Because] a shared, internal community of interest does not exist between the petitioned-for JC Support employees and the Unit employees … the second step of the community-of-interest inquiry is not invoked. Accordingly, I do not adopt the Hearing Officer's unwarranted discussion and comparative analysis at that step.

(Decision at p. 4.)

While the Board has no reason or mechanism to directly review the Hearing Officer's findings at Step 2 of the *Boeing* test, as those findings were not adopted by the Region, the Hearing Officer's contradictory analysis is but more evidence that her findings at Step 1 of the test were flawed. Despite the Hearing Officer making at least two analytical errors at Step1 of the *Boeing* test, and another at Step 2, the Region still adopted her Step 1 findings with little in the way of additional analysis. This is clear error, and further supports the Union's case for review.

B. THE BOARD SHOULD GRANT REVIEW BECAUSE THE REGION MISINTERPRETED A CLAUSE IN THE PARTIES' ELECTION AGREEMENT WHICH WAS MEANT TO CREATE AN ADDITIONAL CLASS OF ELIGIBLE VOTER BASED ON AMOUNT OF BARGAINING UNIT WORK PERFORMED, NOTWITHSTANDING THE VOTER'S OSTENSIBLE JOB CLASSIFICATION

The Election Agreement provides that "all full-time and regular part-time" employees in various classifications are eligible to vote. (Report at p. 2, ¶ 2; Decision at p. 2.) The agreement goes on to state: "*Also* eligible to vote are all employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election." (*Ibid*. [emphasis added].) According to the Region, this "also eligible" clause does not identify a second group of voters omitted from the above-listed classifications. Instead, the Decision concludes that the parties merely meant to clarify the formula used to qualify an employee as "regular part-time." *See Davison-Paxon*, 185 NLRB 21 (1970) (Setting out the Board's formula for regular part-time work). This departs from common sense and basic contract interpretation principles, and is therefore grounds for review.

On this issue, the Region adopted the Hearing Officer's Report with essentially no additional analysis. The Hearing Officer, in turn, applied the Board's *Caesar's Tahoe* test for interpreting stipulated election agreements. *See* 337 NLRB 1096 (2002). At Step 1 of this test, she concluded that the parties' agreement here, specifically the "also eligible" clause, is ambiguous on its face. (Report at p. 12, ¶ 3.) This is incorrect. Due to the presence of the word "also," there is only one reasonable interpretation of this clause. If the phrase was meant merely to define the parameters of the first class of voters, (1) the word "also" would be superfluous, and (2) the phrase would have either appeared directly after the word "part-time," or there would be some additional language to the effect of "by 'regular part-time,' the parties mean …" It is a "well-established principle that no part of a contract's language should be construed in such a way as to be superfluous." *See CVS Albany, LLC*, Case 29-RC-155927, 2016 NLRB LEXIS 416, at *7 (June 7, 2016), citing Restatement (Second) of Contracts § 203(a). The parties clearly meant to include the word also, and therefore meant to establish a second class of eligible voter.

Because there was no reason for the Hearing Officer to proceed to Step 2 of the *Caesar's Tahoe* test, the Report's reliance on external sources to interpret the "also eligible" clause — such as the Board's Casehandling Manual and the *Automatic Fire Systems* case[4] — is misplaced. Even if extrinsic evidence *was* proper, however, the Hearing Officer's citation of *Automatic Fire Systems* would still be troubling. (Report at p. 13, ¶ 1.) There, the Board decided that a similar "also eligible to vote" clause was meant to clarify the applicable part-time hours requirement. *Automatic Fire Systems*, 357 NLRB at 2340. The Hearing Officer relies on this holding to dismiss the importance of the word "also" here. (Report at p. 13, ¶ 1.) This reasoning is flawed. The Board in *Automatic Fire Systems* only included a short excerpt of the parties' stipulation:

> Also eligible to vote are all employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months preceding the eligibility date for the election or who have had some employment in that period and who have been employed 45 working days or more within the 24 months preceding the eligibility date for the election and who have not been terminated for cause or quit voluntarily prior to the completion for the last job for which they were employed [sic].

(*Ibid*.)

Admittedly, this language is similar to the "also eligible" clause here. But this is not the entirety of the agreement. There is simply no way to make a one-to-one comparison between *Automatic Fire Systems* and the instant case without seeing more. If the Hearing Officer's entire premise in the instant case was that the "also eligible" clause exists to modify a previous clause, there has to actually be a previous clause in a comparator case. In sum, the Report's reliance on *Automatic Fire Systems* as justification for ignoring the key word "also" should be reevaluated.

C. THE BOARD SHOULD GRANT REVIEW BECAUSE THERE IS AN ABSENCE OF BOARD PRECEDENT SUPPORTING THE REGION'S CONTENTION THAT *BUTLER ASPHALT* APPLIES, IN SPITE OF CLEAR FACTUAL DIFFERENCES BETWEEN THAT CASE AND THE INSTANT MATTER

The Hearing Officer relied on *Butler Asphalt* for the proposition that the Employer's misclassification of Ms. Roberts and Ms. Naranjo is irrelevant unless Local 287 can show that

[4] See 357 NLRB 2340 (2013).

the misclassification was a deliberate attempt to "gerrymander" the result of the election. (Report at p. 13, ¶ 2.) The Regional Director adopted this finding without any additional analysis. (Decision at p. 3.) As the Hearing Officer noted, the *Butler Asphalt* Board held that "looking behind" a voter's ostensible job classification is inconsistent with *Caesar's Tahoe*, because the parties "know the employees' job titles and intend the descriptions in the stipulation to apply to those job titles," and because "employers and labor organizations can expect that their unambiguous stipulated election agreements will be enforced as written." (Report at p. 13, ¶ 1.) *Butler Asphalt* should not apply to this specific set of facts, however.

In *Butler Asphalt*, the election agreement at issue unambiguously excluded the classification "laborer." *See* 352 NLRB at 189. Conveniently, the only employees whose eligibility was at issue were classified as laborers. *See id*. Here, by contrast, the Hearing Officer found that there is ambiguity in the election agreement. (Report at p. 12, ¶ 3.) Assuming, but not conceding, that such ambiguity exists, any "expectation" that the Election Agreement will be enforced "as written" goes out the window. According to the Hearing Officer's own Report, it would be impossible to enforce the agreement "as written," because extrinsic evidence is required to understand it. Thus, where a stipulated election agreement is ambiguous, the entire rationale for the *Butler Asphalt* doctrine is undercut, and the Hearing Officer should be able to look behind an employee's job classification to decide their eligibility. Here, that would include Sonja Roberts, who the Hearing Officer admits "performed far more Shoe Expediter duties than Shoe Sales Associate duties during the period she was classified as a Shoe Sales Associate" (Report at p. 14, ¶ 1); Madelynn Martinez, who "spent about 15 hours out of a 40-hour week working with non-vendor paid brands" (Report at p. 8, ¶ 2); and Emma Naranjo.

IV. CONCLUSION

The Union requests review on three separate grounds. First, the Region misapplied the *Boeing* test for proper unit composition, and its finding that the JC Support employees do not share an internal community of interest with the rest of the petitioned-for unit is clear error. Second, the Region departed from Board precedent, as well as basic principles of contract

interpretation, in its finding that the "also eligible" clause in the parties' Election Agreement was meant merely to restate part-time eligibility requirements. And third, the Region failed to cite compelling Board precedent for the proposition that the *Butler Asphalt* misclassification standard should apply where an election agreement is ambiguous. Each of these errors raise substantial questions of law and/or policy.

Dated: February 7, 2020

Respectfully submitted,

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AMENDED CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

On February 6, 2020, I served the following documents in the manner described below:

PETITIONER'S REQUEST FOR REVIEW

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on February 6, 2020.

/s/ Karen Kempler
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